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Briefs and Other Related Documents

United States District Court,E.D. New York.
In re HOLOCAUST VICTIM ASSETS LITIGATION.
This Document Relates to All Cases.
Nos. 96 Civ. 4849 (ERK)(MDG), 99 Civ. 5161 and 97 Civ. 461.

July 26, 2000.
As Corrected Aug. 2, 2000.

In ruling on proposed settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks, the District Court, Korman , Chief Judge, held that settlement, which called for payment of $1.25 billion in four installments over the course of three years in return for broad releases, was fair, reasonable, and adequate, and therefore would be approved.

Settlement approved.

West Headnotes

[1] Compromise and Settlement 89 ⚿57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases
Determination of whether proposed settlement of a class action is fair, reasonable and adequate involves consideration of both the process by which the settlement was reached and the substantive terms of the settlement itself. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[2] Compromise and Settlement 89 ⚿57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Compromise and Settlement 89 ⚿59

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k59 k. Adequacy or Representation; Collusion. Most Cited Cases
Determination of fairness of procedural component of proposed settlement of a class action focuses on the negotiating process by which the settlement was reached; the process must be examined in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[3] Compromise and Settlement 89 ⚿59

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k59 k. Adequacy or Representation; Collusion. Most Cited Cases
Judge ruling on the fairness of a settlement has a fiduciary duty to ensure that the settlement is not the product of collusion. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[4] Compromise and Settlement 89 ⚿61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks was reached as the result of lengthy, well-informed and arm's-length negotiations, and was untainted by financial interest of counsel; key members of plaintiffs' executive committee who negotiated settlement provided their services on a pro bono basis, at most requesting that, in lieu of attorney fees, that payments be made to law schools to endow Holocaust remembrance chairs in honor of class members who did not survive, and to foster international human rights law designed to prevent similar human tragedies in the future, and numerous lawyers, including plaintiffs' lead settlement counsel, waived all attorneys' fees. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[5] Compromise and Settlement 89 ⚷57

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Factors considered in evaluating fairness of substantive component of proposed settlement of a class action include (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of maintaining the class action through the trial; (6) the ability of the defendants to withstand a greater judgment; (7) the range of reasonableness of the settlement fund in light of the best possible recovery; (8) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[6] Compromise and Settlement 89 ⚷61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Settlement of Holocaust Victim Assets Litigation against two leading Swiss banks, which called for payment of $1.25 billion in four installments over the course of three years in return for broad releases, was fair, reasonable and adequate, and therefore would be approved; classes consisted of " deposited assets" class, "looted assets" class, two " slave labor" classes, and a "refugee" class. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[7] Compromise and Settlement 89 ⚷68

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k68 k. Notice and Communications. Most Cited Cases

Federal Civil Procedure 170A ⚷177.1

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak177.1 k. In General. Most Cited Cases

A party who seeks to enforce a contract for a release extinguishing the claims of a particular class cannot in good faith withhold from class members the information necessary in order to claim benefits to which they are entitled.

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Roger M. Witten, Wilmer, Cutler & Pickering, Washington, DC, for defendants.

MEMORANDUM & ORDER

KORMAN, Chief Judge.

I address here the legal issue of the fairness of the $1.25 billion settlement of the Holocaust Victim Assets Litigation against two leading Swiss banks.

The words of Ernest Lobet, a survivor of the Holocaust, provide the best summary of the conclusion that I reach after the analysis to follow:

I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and ... that they be supported and the settlement be approved.

Transcript of Fairness Hearing, November 29, 1999, at 146.

Background and Procedural History

I. ***Nature of the Lawsuit and Proposed Settlement***

Beginning in late 1996 and early 1997, plaintiffs filed a series of class action lawsuits against defendants. The original class action complaints were amended and refiled in July 1997 as four separate actions, consolidated under Master Docket No. 96 Civ. 4849: *Sonabend, et al. v. Union Bank of Switzerland, et al.; Trilling-Grotch, et al. v. Union Bank of Switzerland, et al.; Weisshaus, et al. v. Union Bank of Switzerland, et al.;* and *World Council of Orthodox Jewish Communities, Inc., et al. v. Union Bank of Switzerland, et al.*

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory ***142** and punitive damages, and declaratory and other appropriate relief.

In May 1997, defendants filed motions to dismiss the litigation, or, in the alternative, for a stay. The motions, supported by expert affidavits, argued that the actions should be dismissed because plaintiffs failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing. Defendants also argued that I should abstain from adjudicating plaintiffs' claims in favor of ongoing non-judicial initiatives to redress all of plaintiffs' claims, and argued that Switzerland, not the United States, was the proper forum for plaintiffs to pursue the relief to which they believed they were entitled. I heard lengthy argument on defendants' motions on July 31, 1997. At argument, I voiced concerns about the viability of certain causes of action and I identified several additional legal issues that the parties subsequently addressed in post-hearing memoranda of law.

While the motions to dismiss were pending, the parties engaged in discussions resulting in a Settlement Agreement, which made it unnecessary for me to decide the motions.

The settlement discussions were facilitated, initially, by former United States Under Secretary of State, now Deputy Secretary of Treasury, Stuart Eizenstat. Subsequently, I became intimately involved in the settlement discussions that led to an agreement in principle in August 1998. The key terms of the proposed Settlement Agreement are as follows:

1. *Settlement Fund:* Defendants have agreed to pay $1.25 billion, in four installments, over the course of three years. Pursuant to the terms of the Settlement Agreement, defendants paid the first and second installments into an escrow fund on November 23, 1998 and 1999, respectively. As originally set forth in the Settlement Agreement, the two remaining payments were to be made on November 23, 2000 and 2001, respectively. However, the parties have agreed to amend the Settlement Agreement to provide for acceleration of certain payments and modification of the flow of funds between the escrow fund and the settlement fund in order to generate additional interest payments payable to the settlement fund. The additional interest payments are designed to partially defray the cost of the claims process for the Deposited Assets Class, which is defined below.

2. *Defenses Waived:* As part of the settlement, defendants have foregone potentially dispositive legal and factual defenses, including the following: (i) whether this dispute is justiciable, (ii) whether plaintiffs' claims are barred under applicable foreign law, (iii) whether plaintiffs have standing to assert various claims and (iv) whether the claims are time-barred under applicable statutes of limitation and repose, or by the doctrine of prescription.

3. *Revival of Claims:* The settlement protects class members whose claims may otherwise have been deemed expired under applicable statutes of limitation and repose.

4. *Distribution:* The settlement does not preordain a plan for distribution of the settlement fund. Instead, the settlement sets forth a fair and open mechanism for the development of criteria pursuant to which distribution and allocation determinations will be made.

5. *Settled Claims:* In exchange for the settlement amount paid by the settling defendants, settling plaintiffs and settlement class members have agreed irrevocably and unconditionally to release, acquit and forever discharge certain releasees from any and all claims relating to the Holocaust, World War II and its prelude and aftermath, victims or targets of Nazi persecution, transactions with ***143** or actions of or in connection with the Nazi regime, treatment by the Swiss Confederation or other releasees of refugees fleeing persecution, or any related cause or thing whatever. Certain limited exceptions are detailed in the Settlement Agreement. The settlement resolves not only the cases coordinated as part of the above-captioned proceeding, but also resolves additional related cases, including cases in California and Washington, D.C. captioned *Markovicova, et al. v. Union Bank of Switzerland, et al.,* Case No. C98-2924 (N.D.Cal.), and *Rosenberg, et al. v. Swiss National Bank,* Case No. 1:98-CV-01647 (D.D.C.).

6. *Class Beneficiaries:* The parties agreed that the settlement should benefit generally persons recognized as targets of systematic Nazi oppression on the basis of race, religion or personal status. Declaration of Burt Neuborne, Esq. (Nov. 5, 1999) ("Neuborne Decl. I") ¶ 23. Accordingly, at the initiative of plaintiffs' Executive Committee, the settlement was explicitly designed to benefit Jews, homosexuals, Jehovah's Witnesses, the disabled and Romani-groups recognized by the United Nations as having been the targets of systematic Nazi persecution on the basis of race, religion or personal status. *Id.* Thus, four of the five settlement classes defined below benefit these targets of Nazi persecution.

Because the defendant banks sought to settle not only the causes of action alleged against them, but were seeking to resolve legal claims against Swiss governmental and business entities, the releases described in the fifth numbered paragraph above included entities that were not named as defendants in this case. *See* Settlement Agreement ¶ 1 (definition of "Releasees"). Also for this reason, at least one of the five settlement classes described below, the Refugee Class, includes victims of Nazi persecution who did not suffer any injury as a direct or indirect result of conduct of the defendant banks or of any Swiss banks.

II. *The Settlement Evaluation Process*

A. *Preliminary Approval and Class Certification*

In an order dated March 30, 1999, I preliminarily approved the proposed settlement and certified five settlement classes under Fed.R.Civ.P. 23(a) and 23(b)(3). The classes certified were the following:

1. *Deposited Assets Class:* The Deposited Assets Class consists of victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from deposited assets or any effort to recover deposited assets.

2. *Looted Assets Class:* The Looted Assets Class consists of victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from looted assets or cloaked assets or any effort to recover looted assets or cloaked assets.

3. *Slave Labor Class I:* Slave Labor Class I consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such ***144** revenues or proceeds through, releasees, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from the deposit of such revenues or proceeds or cloaked assets or any effort to obtain redress in connection with the revenues or proceeds from slave labor or cloaked assets.

4. *Slave Labor Class II:* Slave Labor Class II consists of individuals and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized or based in Switzerland or any affiliate thereof, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee other than settling defendants, the Swiss National Bank, and other Swiss banks for relief of any kind whatsoever relating to or arising in any way from such slave labor or cloaked assets or any effort to obtain redress in connection with slave labor or cloaked assets.

5. *Refugee Class:* The Refugee Class consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused or otherwise mistreated, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from such actual or alleged denial of entry, deportation, detention, abuse or other mistreatment.

B. *Dissemination of Notice*

My grant of preliminary approval and class certification allowed for implementation of the second step in the settlement evaluation process-*i.e.*, dissemination of notice of the proposed settlement and class certification to the settlement classes. *See* Federal Judicial Center, *Manual for Complex Litigation-Third* ("*MCL 3d* ") §§ 30.212, 30.41 (1995).

The notice plan, which I approved in an order dated May 10, 1999, was tailored to the unique circumstances of this case; was effective as implemented, as discussed below, in that it provided the best notice practicable under the circumstances in terms of content, format and dissemination; and satisfied due process requirements and Fed.R.Civ.P. 23(c). There is no list of all the members of the settlement classes that would have permitted the notice administrators to send notice exclusively by direct mail to all settlement class members. Instead, I directed settlement class counsel, through four notice administrators, to implement the multi-faceted notice plan, involving, in addition to direct mail utilizing existing lists covering segments of the settlement classes, worldwide publication, public relations (*i.e.,* "earned media"), Internet and grass roots community outreach.

Each of the court-appointed notice administrators oversaw distinct aspects of the notice plan, and their various reports filed with the court detail the exhaustive efforts undertaken to give all settlement class members an opportunity to learn of their rights, evaluate the basic terms of the proposed settlement and comment, either by submitting correspondence, e-mailing the notice administrators or returning an Initial Questionnaire.

Each element of the notice plan that I approved has been successfully implemented, including the following: (i) world-wide ***145** publication, (ii) press coverage, (iii) an extensive community outreach program, (iv) a direct mail program that included the sending of more than 1.4 million notice packages directly to potential class members in at least 48 countries and (v) an Internet notice effort.

C. *Fairness Hearings*

The third and final step in the class action settlement evaluation process was a final approval hearing, also known as a "fairness hearing," pursuant to Fed.R.Civ.P. 23(e). I held a fairness hearing in the United States District Court for the Eastern District of New York on November 29, 1999. The hearing was open to all settlement class members. I also conducted and presided (by electronic hookup) over a supplemental fairness hearing that was held in Israel on December 14, 1999. The hearing was open to a random sampling of Israelis who submitted Initial Questionnaires in response to the notice. I have considered the views of the settlement class members presented at these final approval hearings, and through the written correspondence of class members, whether submitted in hard copy or by e-mail.

D. *Subsequent Amendments to the Settlement Agreement*

After preliminary approval, the parties amended the Settlement Agreement and escrow agreement to provide that settling defendants would pay the second installment of the settlement amount into the escrow fund, to permit the escrow agents to authorize disbursements of up to $20 million in the aggregate for payment of certain costs incurred in implementing the settlement, and to permit the escrow agents to authorize additional disbursements from the escrow fund for settlement implementation costs, subject to court approval.

The parties have made additional modifications to the Settlement Agreement since its preliminary approval. These modifications will be discussed in the part of this memorandum that addresses the objections and comments to the Settlement Agreement made in response to the notice of proposed settlement. I add this caveat: just as I was ready to release this opinion last week, counsel for the defendant banks threatened to repudiate the modifications because he was unhappy with certain good faith obligations imposed upon the releasees to provide information necessary to allow members of the plaintiff class to obtain the benefits of the Settlement Agreement. I discuss the circumstances of this threat *infra* at 163-66. My initial discussion of the Settlement Agreement assumes that defendants Union Bank of Switzerland and Credit Suisse will act responsibly and adhere to the modifications. If they do not, then, for reasons that I will explain, I will approve the Settlement Agreement without the modifications.

Discussion

[1] "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). This determination involves consideration of both the process by which the settlement was reached and the substantive terms of the settlement itself. *Id.* at 73-74. I have considered both the procedural fairness of the settlement process, and the overall adequacy and reasonableness of the substantive terms of the proposed settlement, and find that each of these

components weighs in favor of final approval.

I. ***Procedural Fairness***

[2][3] I turn first to the procedural component of the fairness determination. This consideration focuses on the "negotiating process by which the settlement was reached." *Weinberger,* 698 F.2d at 73. The process must be examined "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred ***146** the negotiations themselves." *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983). In particular, a judge ruling on the fairness of a settlement has a fiduciary duty to ensure that the settlement is not the product of collusion. *See In re Warner Communications Securities Litigation,* 798 F.2d 35, 37 (2d Cir.1986) . "So long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement." *In re NASDAQ Market-Makers Antitrust Litigation,* 187 F.R.D. 465, 474 (S.D.N.Y.1998).

[4] In a class action, the principal impediment to assuring an untainted settlement process is the financial interest of counsel, who may be improperly influenced to accept certain settlement terms, or to accept a settlement at all, thereby " subordinat[ing] the interests of class members to the attorney's own economic self-interest." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 Colum. L.Rev. 370, 371-72 (2000). As plaintiffs' lead counsel observes, however, such a "divided loyalty" structural concern is absent from this case. Neuborne Decl. I ¶ 28. Key members of the plaintiffs' Executive Committee who negotiated this settlement are providing their services on a *pro bono* basis, at most requesting that, in lieu of attorneys' fees, payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who did not survive, and to foster international human rights law designed to prevent similar human tragedies in the future. *Id.* Numerous lawyers, including plaintiffs' lead settlement counsel, have waived all attorneys' fees. Those relatively few members of the plaintiffs' Executive Committee who are seeking fees personally have agreed to limit their fee applications to the traditional "civil rights" standard of lodestar for time actually expended that materially advances the litigation, and all fees are capped at no more than 1.8% of the settlement fund, with discretion to award a lower sum. *Id.*

Moreover, based upon my extensive personal involvement in the process, I know that the compromise was reached as the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties. Counsel for the plaintiff settlement classes are experienced plaintiffs' advocates and class action lawyers. One could not assemble a more capable group. Among the lawyers for the plaintiffs who are serving without fee are Professor Burt Neuborne of New York University Law School, a brilliant scholar and advocate, who developed the class's legal theories and who presented legal argument on behalf of plaintiffs, and Melvyn H. Weiss and Michael D. Hausfeld, leading members of the class action bar, who ably led plaintiffs' negotiating team. While I have independently evaluated the fairness of the settlement, the unanimous support of this group in favor of final approval is entitled to great weight. *See NASDAQ,* 187 F.R.D. at 474 (where court is satisfied that negotiations were conducted at arm's length and in good faith, " 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation" (citation omitted)).

II. ***Substantive Fairness***

[5] I now turn to the substantive component of the fairness determination. This consideration generally is evaluated by reference to the list of specific factors identified in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974). These factors, all or some of which may be relevant, depending on the case, include

(1) the complexity, expense and likely duration of

the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the ***147** risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (internal citations omitted). While I do not consider each of these factors in the order in which they are set forth in *Grinnell,* I address a number of them in the following discussion. The remaining factors, to the extent they are relevant to this case, are addressed in the context of my discussion of the various objections and comments raised concerning the Settlement Agreement. *See infra* § III. The *Grinnell* factors weigh heavily in favor of a finding of substantive fairness.

[6] I begin by noting that, as of May 8, 2000, some 550,000 Initial Questionnaires had been received from class members worldwide, Settlement Class Counsel's Update on Notice Administration (June 15, 2000) ¶ 4, suggesting a widespread interest in participation in the settlement. Approximately 32,000 letters had been received, only approximately 243 of which commented upon or objected to the settlement, and approximately 448 of which contained comments on the plan of allocation or the claims process. *Id.* ¶¶ 5-6. Approximately 401 opt-out requests had been received, a few of which have since been withdrawn, and a percentage of which were from persons who are not class members or who simply did not understand the purpose or nature of the request. *Id.* ¶ 8. Correspondence is still being received by the notice administrators, consisting almost exclusively of Initial Questionnaires and comments on the allocation and distribution of settlement funds.

The above figures help demonstrate that the response of the classes has been overwhelmingly positive, as the vast majority of class members responding to the notice are interested in participating in the settlement, and only a tiny fraction of class members has expressed dissatisfaction with its terms. In addition to the positive response of class members themselves, there is virtually unanimous worldwide support for the settlement from Jewish and Holocaust survivors' organizations, many of whom have executed written endorsements of the settlement. They include the Agudath Israel World Organization, Alliance Israelite Universelle, the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, the American Jewish Congress, the American Jewish Joint Distribution Committee, the Anti-Defamation League, B'nai B'rith International, the Centre of Organizations of Holocaust Survivors in Israel, the Conference on Jewish Material Claims Against Germany, the Council of Jews from Germany, the European Council of Jewish Communities, the Holocaust Educational Trust, the Jewish Agency for Israel, the Simon Wiesenthal Center, the World Jewish Congress and the World Zionist Organization. In addition to those groups that have expressly endorsed the settlement, various others, including the Jehovah's Witnesses, Disability Rights Advocates, the International Gay and Lesbian Association and several groups representing the interests of the Romani (as well as the Sinti, who are a subgroup of the Romani) have implicitly endorsed the settlement by submitting proposals for the allocation and distribution of the settlement funds. Indeed, Roman Kwaitkowski, who is the president of the Polish Association of Roma, appeared at the fairness hearing to express his appreciation for the fact that "this time, nobody forgot about us." Transcript of Fairness Hearing, November 29, 1999, at 144-45.

Former United States Senator Alfonse D'Amato, who participated in the settlement negotiations as an advocate for Holocaust victims, also has concluded that the settlement is eminently fair and brings closure to the questions raised about the ***148** role of Switzerland during World War II. Similarly, New York City Comptroller Alan Hevesi, who led a group of state and local public finance officials that monitored the negotiations between the parties, has publicly stated that the settlement is fully fair, reasonable and adequate.

The United States, which participated actively in settlement discussions over a period of many months, through Deputy Treasury Secretary Eizenstat, has expressed its "unqualified support for the parties' class action settlement" and endorsed it " as fair, reasonable and adequate and unquestionably in the public interest." Transcript of Fairness Hearing (Nov. 29, 1999) at 27 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States). Mr. Gilligan continued as follows:

The United States supports approval of the settlement the parties have reached. It is fair and just and promotes the public interest, as expressed in the policy that the United States government has pursued for the past four years. Because the parties reached for common ground rather than prolong their difference[s], the elderly victims of the Holocaust will receive the benefits of this settlement in their lifetime and much more quickly than would have been possible had the litigation continued.

But of equal importance, the United States regards this settlement as an excellent example of how cooperation and the will to fulfil[1] a moral obligation can lead to voluntary resolution of disputes over Holocaust-era claims.

The government anticipates that the settlement here, by force of its example, will promote the U.S. policy of negotiated settlement in other cases and countries where Holocaust victims' claims for restitution have not yet been resolved. In particular, the United States is hopeful that this settlement will add a sense of urgency and possibility to resolving the pending class action claims of slave and forced laborers who can no longer wait for years for justice to be done.

Id. at 31-32. Mr. Gilligan's prediction that the present settlement would serve as a catalyst for a negotiated agreement of the claims of slave and forced laborers has proven accurate. On March 23, 2000, a final agreement was reached concerning the allocation of an even more substantial settlement fund-approximately $5 billion-in a related litigation on behalf of victims of Nazi slave and forced labor policies, some of whom are also members of the slave labor classes here.

I note that the adequacy and reasonableness of the settlement must be measured against the practical alternative to the settlement in the real world. The alternative to this settlement was prolonged, complex and difficult litigation, in which plaintiffs' chance of success as a class was uncertain. The age and health of many of the class members also presses for a prompt resolution. Because of the passage of time, the destruction of records, and the death of most of the percipient witnesses, the potential amount of damages plaintiffs might have recovered, even if they had been able to prevail in litigation, would have been extremely difficult to calculate with precision.

Defendants raised substantial questions regarding plaintiffs' ability to state claims under either international or state law, at least with respect to some of the claims. Significant and non-frivolous questions were also raised by defendants in their motions to dismiss, including questions regarding the justiciability of some of plaintiffs' claims. Such concerns have resulted in the dismissal of Holocaust-era claims in two recent cases decided in New Jersey. *See Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J.1999); *Burger-Fischer v. DeGussa AG*, 65 F.Supp.2d 248 (D.N.J.1999). I take no position regarding whether these cases were correctly decided, or whether they would even apply here. Instead, I cite them as a reality check for those objectors who believe that ***149** strong moral claims are easily converted into successful legal causes of action. Judge Kram stated it well in her opinion in *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000), in which she observed:

It goes without saying that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity. At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim. Indeed, a number of obstacles stand in the path of plaintiffs' claims in this case.

These words apply with equal force here.

In accepting both the $1.25 billion settlement figure and the defendant banks' demand for broad releases as a fair and reasonable settlement of this class action, plaintiffs' counsel took cognizance of these considerations and balanced the powerful legal and moral claims of the members of the plaintiff classes against (i) the defendant banks' vigorous defense of this action, including the prospect of extensive appellate delays before any judgment could be enforced; (ii) the intransigence of the government of Switzerland and the Swiss National Bank in refusing to contribute to the settlement fund, and in interposing obstacles to the effective prosecution of plaintiffs' legal claims; (iii) the litigation uncertainties surrounding plaintiffs' claims against the defendant banks, especially the difficulty in gaining access to the Swiss banking records needed to establish plaintiffs' claims; (iv) the need for speedy distribution of funds to aged victims, many of whom are in great distress; and (v) the substantial legal and factual uncertainties that would have complicated effective pursuit of legal claims against the Swiss National Bank, the Swiss government and the remaining non-party releasees. Neuborne Decl. I ¶ 6. They came to the conclusion that while, in a perfectly just world, plaintiffs should have received a far greater sum, in the real world, a recovery of $1.25 billion in return for broad releases was the best that dedicated and competent counsel could achieve under the circumstances of this case. *Id.* I agree.[FN1]

FN1. I do not and need not "decide the merits of the case or resolve [the] unsettled legal questions" it presents. *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998-99 n. 14, 67 L.Ed.2d 59 (1981). Instead, I need only " weigh the likelihood of success by the plaintiff class against the relief offered by the Settlement Agreement[ ]." *Marisol A. v. Giuliani,* 185 F.R.D. 152, 164 (S.D.N.Y.1999).

III. *Objections and Comments*

I have considered all of the objections and comments expressed by settlement class members and others at the fairness hearings and through independent submissions to the court. In addition, because I participated extensively in the settlement negotiation process, I am intimately familiar with the competing interests of, and concerns that have been expressed by, persons with an interest in the subject matter of this litigation. These objections and comments do not warrant denial of the motion for final approval.

A. *Deferring Notice of the Proposed Plan of Allocation and Distribution Until After Final Approval of the Settlement Agreement*

The Settlement Agreement provides for the appointment of a Special Master "to develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." Settlement Agreement ¶ 7.1. Under the Settlement Agreement, the Special Master, as a neutral third party, is to consider all suggestions regarding allocation and distribution directly from the class, without relying upon intermediating representatives, such as settlement class counsel or settlement class representatives. The Special ***150** Master will then take that direct input and present a draft plan. That plan will be publicized, and class members will have an opportunity to communicate directly with me regarding it, again, without any intermediaries to dilute the class members' direct influence. Their comments will be addressed and/or incorporated in a final plan. I have appointed Judah Gribetz, Esq., as Special Master in this case.

Mr. Gribetz is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of *The Timetables of Jewish History*

(1993). In addition to working on the plan of allocation and distribution, he has been a wise counsel who has educated me about many of the critical issues relating to the formulation of a meaningful plan of allocation and distribution.

The appointment of a Special Master here also obviates the concern that hypothetical conflicts among class members relating to allocation and distribution would require separate representation, and thus call into question the adequacy of representation. This is so because the class members *represent themselves* on this key issue, and have direct access to the Special Master and to me. The adequacy concerns that informed the Supreme Court's decisions in *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), and *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), are therefore absent from this case. The Special Master will file the proposed plan of allocation and distribution not later than 30 days from the date of the entry of the final judgment approving the settlement.

At the fairness hearings, however, several persons criticized the decision to hold any fairness hearing prior to receiving notice of the specific amounts they were likely to recover. I agree that, ordinarily, it is preferable to provide specific information to class members concerning their likely recovery prior to the fairness hearing in order to permit criticism and challenge, if appropriate. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of events that transpired approximately 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the Settlement Agreement, and under consideration by the Special Master. The implementation of such an elaborate and expensive set of claims processes would be impossible in the absence of a threshold judicial finding that the basic Settlement Agreement, including the gross settlement amount and the procedures for allocating and distributing specific amounts to class members, is fair, reasonable and adequate. Thus, it was physically impossible to provide class members with specific information concerning their individual recoveries at this stage of the proceedings.

To compensate for this inability, counsel provided elaborate notice of the procedures that were to be used to reach the point where specific amounts would be payable, and asked the class to pre-commit to those procedures in lieu of considering a specific amount at this stage of the proceedings. In particular, the unique circumstances of this complex litigation require *both* a fairness hearing on the terms of the basic settlement, and a subsequent opportunity to comment on the Special Master's recommended plan of allocation and distribution. Thus, the parties have contemplated that, once I have approved the basic fairness of the settlement and its ***151** attendant procedures, the Special Master will promptly issue his recommendations concerning allocation and distribution and those recommendations will be transmitted for comment and criticism to the members of the plaintiff classes. Only after I approve the plan of allocation and distribution will a claims process capable of generating specific figures be possible.

Significantly, as the Second Circuit has recognized,
[t]he formulation of the [distribution] plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 170 (2d Cir.1987) (Winter, J.); *see also NASDAQ,* 187 F.R.D. at 480 ("it is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the Plan of Allocation until after final settlement approval"); *MCL 3d* § 30.212 ("Often the details of allocation and distribution are not established until after the settlement is approved"). Moreover, all class members have been informed of this process, and either had the opportunity to participate in it as a fair, transparent and open process for the determination of allocation issues, or had the opportunity to object or exclude themselves. The class overwhelmingly has endorsed such an approach. Under these circumstances, I reject the objection to the bifurcated process contemplated by the Settlement Agreement.

B. *The Volcker Report*

These suits were filed two years after the World Jewish Restitution Organization had initiated discussions regarding certain restitution issues. Such negotiations led to, among other things, the creation of the Independent Committee of Eminent Persons (the "ICEP"). The ICEP, chaired by Paul A. Volcker (and also referred to hereafter as the " Volcker Committee"), was established in May 1996 by the Swiss Bankers Association, the World Jewish Congress and other Jewish organizations to conduct an audit of the settling defendants and other Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution. The Volcker Committee conducted what is likely the most extensive audit in history, employing five of the largest accounting firms in the world at a cost of hundreds of millions of dollars to defendants. At the conclusion of its investigation, the Volcker Committee prepared a formal 100-plus page report, which it released on December 6, 1999 (the "Volcker Report"), setting forth its findings in detail, which included the revelation that approximately 54,000 Swiss bank accounts appear to have a "probable" or "possible" connection to a Holocaust victim. On February 23, 2000, the Volcker Committee announced that a review of the approximately 54,000 accounts identified as "probably" or "possibly" related to victims of Nazi persecution resulted in the elimination of certain accounts because they were duplicates or because of other technical factors, reducing the total number of such accounts to between 45,000 and 50,000. *See* Volcker Committee Press Release (Feb. 23, 2000). The Volcker Committee also announced that it had identified additional accounts that should be included among those "probable" accounts recommended for publication, increasing the total number of publishable accounts from approximately 25,000 to more than 26,000. *Id.* Nevertheless, for the sake of convenience, I use the initial Volcker Committee numbers throughout.

The parties reached an informal agreement to settle this case for $1.25 billion in August 1998, with knowledge that the Volcker Committee's investigation was ongoing and not likely to be completed for ***152** some time. The parties felt that it was appropriate to proceed without waiting, not only because of the reasonableness of the settlement, but because an early agreement set in motion many of the procedural hurdles that had to be overcome in order for the settlement process to reach its current stage of final approval for fairness. These included the further negotiation and formalization of the informal settlement into the Settlement Agreement as originally executed; the preparation and dissemination of class notice; the conduct of the fairness hearings; and the negotiation of amendments to the Settlement Agreement to address valid objections raised at the fairness hearings. If this entire process had been delayed pending the results of the Volcker Report, which was not released until December 1999, the plaintiff class members would now be almost two years further removed from receiving distributions under the Settlement Agreement.

Several persons, however, voiced concern at the fairness hearings that the adequacy of the $1.25 billion settlement should be re-evaluated in light of the Volcker Report's identification of the approximately 54,000 Swiss bank accounts that are " probably" or "possibly" connected to Holocaust victims. While understandable, these objections do not justify upsetting the settlement.

Prior to the issuance of the Volcker Report, plaintiffs' counsel had asserted that, if the case were to proceed to trial, and if they were granted adequate discovery, they would be in a position to demonstrate the existence of large numbers of bank accounts in Swiss banks with a connection to Holocaust survivors. In fact, in conducting the negotiations that culminated in the $1.25 billion Settlement Agreement, plaintiffs' negotiating team utilized figures derived from an economic analysis of the flow of funds into Switzerland during the

EXHIBIT 7

Westlaw.

H
Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.
In re HOLOCAUST VICTIM ASSETS LITIGATION.
No. CV-96-4849-ERK-MDG.

Nov. 22, 2000.

MEMORANDUM & ORDER

KORMAN.

***1** On July 26, 2000, I filed a comprehensive opinion approving the settlement agreement in this case. *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d 139 (E.D.N.Y.2000). This opinion sets forth in detail the history of this case and the relevant terms of a settlement pursuant to which the defendants agreed to pay $1.25 billion to settle the lawsuit to compensate certain classes of victims of Nazi persecution whose injuries were either caused by, or exacerbated by, the alleged behavior of the Swiss bank defendants and other Swiss entities. I now write to address the recommendations of the Special Master with respect to the allocation of the $1.25 billion settlement fund. I assume familiarity with the underlying facts and the details of the Proposed Plan of Allocation and Distribution of Settlement Proceeds ("Proposed Plan").

Briefly, on March 31, 1999, in accordance with the terms of the Settlement Agreement, I appointed a Special Master "to develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." *Settlement Agreement* ¶ 7.1. "The decision [of the parties] to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members." *Submission of Lead Settlement Counsel in Support of Special Master's Proposed Plan of Allocation* at ¶ 3.

I appointed Judah Gribetz to be the Special Master. He is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of *The Timetables of Jewish History* (1993).

On September 11, 2000, the Special Master filed his Proposed Plan. Notice of the Proposed Plan was mailed on a rolling basis, starting in early September, 2000, in 21 different languages. *See Report of Settlement Class Counsel Regarding Implementation of Proposed Plan of Allocation* at Ex. A. 173, 380 copies of the full text of the Special Master's 38-page summary of the Proposed Plan, along with the more concise and condensed Notice were sent to Jewish, Jehovah's Witness, and Roma community organizations, world-wide. *Id.* at 1.

***2** In addition, copies of the Notice were mailed to all of the persons who had submitted correspondence or an Initial Questionnaire, in the appropriate language. Excluding duplicates, the Notice of the Proposed Plan was mailed to 472, 692 persons. *Id.* at 2. Notice was also posted on the

Swiss Bank Claims website (www.swissbankclaims.com), and the entire Proposed Plan was posted on that site as well, including all annexes. In response to the internet posting, and/or in response to organizational outreach efforts, an additional 30,469 persons requested and were mailed copies of the Notice of the Proposed Plan. *Id.* In total, 675,541 notices were distributed to persons and organizations. *Id*.

In response to the notice program described above, approximately 754 communications were received by the Notice Administrator. *Id.* A small number of additional persons or organizations responded in writing directly to the Court. A portion of the communications received in response to the notice of the Proposed Plan were sent by organizations purporting to represent multiple persons, or were sent in the form of petitions signed by many people. It is unclear how many of the persons who signed such petitions are actually members of the Settlement Classes, or submitted Questionnaires. It is known, however, that the overwhelming majority of the Settlement Class members-more than 99 percent-did not submit any comment regarding the Proposed Plan and presumably had no objection.

Of the 754 persons who submitted comments to the Notice Administrator, 561 could be matched with an Initial Questionnaire; 193 could not be matched with an Initial Questionnaire. *Id.* Of the 561 matches that could be made to an Initial Questionnaire, 415 were from claimants who identified as Jewish, 116 were from persons who did not identify themselves as a Victim or Target of Nazi Persecution. *Id.* Six were from persons who identified themselves as being or representing physically disabled. *Id.* Fifteen were from Romani. *Id.* Eight were from Jehovah's witnesses. *Id.*

Of the comments that could matched to a Questionnaire (561), 437 included Looted Assets claims, 90 included Deposited Asset claims, 212 included Slave Labor claims, and 24 included Refugee claims. *Id.* Roughly 40 percent of the persons who commented on the Proposed Plan, and who also submitted a Questionnaire, were survivors; the rest were heirs. *Id.*

The world-wide nature of the response attests to the success of the program of the notice of the Proposed Plan. Only 152 of the comments were from persons or organizations residing in the United States; 92 were from Israel. *Id.* Most were from Eastern Europe and the former Soviet Union. Of the 754 comments, 360 were in Russian, and 115 were in Hungarian. *Id.* In addition to these informal submissions, a number of formal submissions and objections were filed. Professor Burt Neuborne, who has so ably served as plaintiff's lead counsel, filed a compelling response to those objections. On November 20, 2000, I conducted a public hearing on the plan at which approximately forty persons spoke either for themselves or on behalf of other individuals or organizations. After carefully considering all of the comments and objections, I adopt the Plan as submitted by the Special Master.

*3 In introducing his recommendations, the Special Master observes that he "has endeavored to present a Proposal that is not only fair and equitable, but also as meaningful as possible given the number of potential claimants and the limited sum to be divided among them." Proposed Plan at 3. I believe that the Special Master has succeeded in this endeavor. The Proposed Plan is the result of more than one year of extensive historical and factual research, reflecting the myriad complexities posed by the Special's Master's assignment: to recommend the division of a $1.25 billion fund among hundreds of thousands of Nazi victims as well as millions of other claimants, each of whom the Settlement Agreement mandates must fall within at least one of five settlement classes and, for four classes, at least one "victim or target" group.

I believe that the Special Master's recommendations on behalf of each of the five settlement classes-Deposited Assets, Looted Assets, Slave Labor I, Slave Labor II and Refugees-and on behalf of each of the five "victim or target" groups-Jewish, Roma, Jehovah's Witness, homosexual and disabled Nazi victims-are carefully reasoned and well supported.

As contemplated by the Settlement Agreement, the Proposed Plan appropriately places priority upon returning to their rightful owners "the sums that

Swiss banks have been holding for them for more than half a century," *Proposed Plan* at 12. The Proposed Plan properly allocates a substantial portion of the Settlement Fund to the Deposited Assets Class in accordance with the findings of the Volcker Committee, whose report I have previously observed "provided legal and moral legitimacy to the claims asserted here on behalf of the members of the Deposited Assets Class," and whose findings "suggest that the value of deposited assets held by the Swiss banks could exceed the $1.25 billion settlement amount." *In re Holocaust Victims Assets Litigation,* 105 F.Supp.2d at 153. Bearing in mind that any amount allocated to the Deposited Assets Class may be too low, on the one hand-because of the high values the Volcker Report has placed on the unclaimed accounts-and too high, on the other hand-because the passage of time has rendered it impossible to locate each owner of an unclaimed account-the Proposed Plan allocates approximately two-thirds of the Settlement Fund to the Deposited Assets Class.

This recommendation provides for immediate distributions among the members of each of the other four classes, and also enables the Court to redistribute among the class members any amounts not claimed under the $800 million Deposited Assets allocation. Moreover, as the Special Master explains in his report:

In the event that any portion of the $1.25 billion Settlement Fund remains after "Stage 1" payments, which includes Deposited Assets claims, distributions to surviving Nazi victims who are members of the Looted Assets, Slave Labor I and II, and Refugee Classes, and fees and administrative expenses, a second round of payments then can be made. During such a "Stage 2" of payments (if any) there can be additional distributions to surviving Nazi victims, and perhaps also to needy spouses and children of deceased Nazi victims. At that time, it also may be possible to allocate a portion of the remaining Settlement Fund to some of the proposed cultural, memorial or educational projects that have been submitted to the Special Master. To that end, the Special Master recommends that the Court review institutional proposals once an evaluation of the bank account claims, as well as the claims submitted by members of the other four classes, is completed.

***4** *Special Master's Proposal* at 19-20 (footnotes omitted).

I noted at the outset, quoting from Professor Neuborne, that the parties hoped that "a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members." *Submission of Lead Settlement Counsel in Support of Special Master's Proposed Plan of Allocation* at ¶ 3. I agree with Professor Neuborne's conclusion that: "The Special Master was remarkably successful in inviting and obtaining the guidance of interested members of the community. He conferred widely with an extraordinary array of persons who expressed a desire to provide advice or guidance on the fairest way to allocate the settlement proceeds. The openness and transparency of his deliberations adds immeasurably to the moral and legal persuasiveness of his proposed plan of allocation." *Id.* at ¶ 4.

Conclusion

For the foregoing reasons, and for all of the reasons set forth in the Proposed Plan, incorporated herein by reference, I adopt the Proposed Plan in its entirety. Because of my desire to proceed as expeditiously as possible, I also adopt Professor Neuborne's cogent and detailed responses to the objections voiced to the Plan without separately addressing each of them here. I may file a supplemental memorandum addressing some of these objections.

Finally, I echo Professor Neuborne's acknowledgment of the work of the Special Master, and his staff. As Professor Neuborne observes in his submission:

[O]n behalf of the settlement classes, and plaintiffs' counsel, I offer heartfelt thanks and appreciation to Mr. Gribetz and his devoted staff, especially Shari C. Reig, Ted Poretz and Alyson M. Weiss, for the successful completion of a task that enables the

swift and fair distribution of the settlement fund, while respecting the dignity and individuality of every survivor.
Id. at ¶ 24.

SO ORDERED.

E.D.N.Y.,2000.
In re Holocaust Victim Assets Litigation
Not Reported in F.Supp.2d, 2000 WL 33241660 (E.D.N.Y.)

Briefs and Other Related Documents (Back to top)

• 2000 WL 34498383 (Trial Motion, Memorandum and Affidavit) Supplemental Declaration of Burtneuborne in Support of an Application for an Order Pursuant to Rule 23(e) Approving the Settlement Agreement as Fair, Adequate and Reasonable (Jun. 26, 2000)

END OF DOCUMENT

EXHIBIT 8

H
Briefs and Other Related Documents

United States District Court,E.D. New York.
In re HOLOCAUST VICTIM ASSETS LITIGATION.
Nos. CV-96-4849(ERK)(MDG), CV-99-5161, CV-97-461.

March 9, 2004.

Background: Following judicial approval of settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks, 105 F.Supp.2d 139, objections were made to Special Master's recommendations regarding allocation of settlement funds.

Holdings: The District Court, Korman, Chief Judge, held that:

1(1) it would not immediately distribute $200 million to committee of Holocaust survivors to decide how it should be spent;

2(2) District Court would not distribute funds pro rata among different countries for benefit of needy survivors within the country;

3(3) umbrella organization of Holocaust survivors and survivor groups lacked standing to object on behalf of its purported members; and

4(4) attorney who filed objections purportedly on behalf of umbrella organization's members was not entitled to $3 million fee for his services.

Ordered accordingly.

West Headnotes

[1] Compromise and Settlement 89 ⚷72

89 Compromise and Settlement
89II Judicial Approval
89k72 k. Construction, Operation, and Effect; Supervision. Most Cited Cases
On objections to Special Master's recommendation that $60 million of proceeds of settlement of consolidated class actions brought by Holocaust victims against two Swiss banks be distributed immediately to certain class members, District Court would not immediately distribute $200 million to committee of Holocaust survivors to decide how it should be spent; such a distribution would cause court to relinquish its requisite control over distribution process.

[2] Deposits in Court 123 ⚷11

123 Deposits in Court
123k11 k. Disposition Under Judgment or Order of Court. Most Cited Cases
(Formerly 89k72)
On objections to Special Master's recommendation that $60 million of proceeds of settlement of consolidated class actions brought by Holocaust victims against two Swiss banks be allocated for cy pres distribution to neediest victims whose assets were looted by Nazis, District Court would not distribute funds pro rata among different countries for benefit of needy survivors within the country; pro rata distribution would unfairly benefit victims who were part of small group of needy survivors within large nationwide survivor population, such as the United States, while desperately poor survivors in countries with larger concentration of needy survivors, such as former Soviet Union countries, would receive next to nothing.

[3] Corporations 101 ⚷499

101 Corporations
101XI Corporate Powers and Liabilities
101XI(F) Civil Actions

101k499 k. Capacity to Sue and Be Sued in General. Most Cited Cases
Umbrella organization of Holocaust survivors and survivor groups was not a membership corporation, and thus, it lacked standing to object on behalf of its members to Special Master's recommendations regarding allocation of settlement funds in consolidated class actions brought by Holocaust victims against Swiss banks; even if survivors and survivor groups had been elected to membership in organization, there was no proof that members consented to representation by organization, or that members individually had standing to object.

[4] Attorney and Client 45 ⚷155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases
Attorney who filed objections to Special Master's recommendations regarding allocation of settlement funds in consolidated class actions brought by Holocaust victims against Swiss banks, purportedly on behalf of members of umbrella organization of Holocaust survivors and survivor groups, was not entitled to $3 million fee for his services, where attorney had accomplished nothing in relation to his efforts to correct alleged imbalance in allocation of funds, given that his objections were rejected; settlement fund was not set up to pay legal or other expenses of survivor groups.

***90** Burt Neuborne, New York University Law School, New York, NY, lead class counsel.
Robert A. Swift, Kohn, Swift & Graf, P.C., Philadelphia, PA, one of plaintiffs' class counsel.
Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL, for Holocaust Survivors Foundation-USA, Inc.
Roger M. Witten and Christopher P. Simkins, Wilmer Cutler Pickering, LLP, Washington, DC, for defendants Credit Suisse and Union Bank of Switzerland.

MEMORANDUM & ORDER

KORMAN, Chief Judge.
I address here yet another issue that has arisen with respect to the $1.25 billion settlement of the class action against the largest Swiss banks, Credit Suisse, Union Bank of Switzerland and the Swiss Bank Corporation (the latter two of which merged during the course of litigation). The background of the case and settlement is set out in *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d. 139 (E.D.N.Y.2000), and a discussion of some of the post-settlement issues may be found at *In re* ****91*** *Holocaust Victim Assets Litigation,* No. CV-96-4849, 302 F.Supp.2d 59, 2004 WL 318468 (E.D.N.Y. February 19, 2004), *In re Holocaust Victim Assets Litigation,* 270 F.Supp.2d 313 (E.D.N.Y.2002), and at *In re Holocaust Victim Assets Litigation,* No. 96 Civ. 4849ERK MDG, 2000 WL 33241660 (E.D.N.Y. November 22, 2000)
.

The specific issue here involves a dispute relating to the allocation of part of the proceeds of the settlement. Briefly, one of the classes benefitting from the settlement was comprised of victims of Nazi persecution from whom assets were looted by the Nazis and the plunder of which was aided by Swiss banks. Special Master Judah Gribetz recommended initially that $100 million be allocated to this Looted Assets Class and that the money be distributed to its neediest members. *See* Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds 110-142 (hereafter "Plan of Allocation"). I discuss later the reasons underlying that recommendation, which I adopted on November 22, 2000, *see In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, and which the Second Circuit affirmed on July 26, 2001. *See In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132, 134 (2d Cir.2001). On September 25, 2002, I adopted another recommendation of the Special Master that an additional $45 million in "excess" funds be allocated to that class. Finally, on November 17, 2003, I adopted the recommendation of the Special Master that $60 million in "excess" funds be allocated to the Looted Assets Class and be distributed in accordance with the *cy pres* principles that have successfully governed the administration of the initial allocation and distribution of $100 million to the Looted Assets Class in 2001, and the first supplemental allocation and distribution of $45 million in 2002.

I also adopted the Special Master's recommendations made in response to my request seeking his view on the appropriateness of allocation of money, if any, that may remain undistributed from the $800 million allocated to the Deposited Assets Class, which is composed largely of heirs of victims of Nazi persecution who deposited funds in Swiss banks. The Special Master recommended that, "as with the excess funds, residual unclaimed funds, if any, should likewise be re-allocated to the Looted Assets Class for distribution to needy Nazi victims in accordance with the *cy pres* principles governing the administration of that class." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, at 7 (hereafter "Special Master's Interim Report"). Because any such distribution would involve residual unclaimed funds, "the disposition of which has not yet been the subject of discussion by class members, the Special Master recommend[ed] that the Court solicit proposals from a broad array of interested persons and organizations as to how best to identify and to benefit the neediest survivors." *Id.* He further urged that, "depending upon the amount of residual, if any, the Court may wish to consider a modest distribution to communal, remembrance and/or educational programs." *Id.* at 13 n. 14.

The Special Master observed that, by the end of the proposed filing and comment period in connection with proposals submitted by interested persons and organizations, a reasonably firm Deposited Assets Class distribution assessment should be available, rendering it possible to estimate the amount of unclaimed funds, if any, available for *cy pres* distribution. At that point, after considering such proposals, the Special Master will issue a final recommendation as to how to distribute unclaimed funds. The date provided in my ***92** November 17, 2003 order for the submission of the final recommendation of the Special Master was March 15, 2004. I subsequently received numerous requests for additional time to submit proposals, and I extended the date for the Special Master's final recommendation to April 16, 2004. After a public hearing to be held on April 29, 2004, I will make a final determination as to the distribution of any residual funds.

My order of November 17, 2003 also explicitly rejected objections that had been filed by Samuel Dubbin on behalf of the Holocaust Survivors Foundation-USA, Inc., (HSF-USA), and those filed by Robert Swift. I indicated then that an opinion would follow, and I now provide that opinion. The Special Master's Interim Report, the Declaration of Burt Neuborne in Support of the Interim Report of the Special Master (hereafter "Neuborne Declaration "), and the Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel Dubbin, Esq. (hereafter "Supplemental Neuborne Declaration") provide a compelling case for the adoption of the recommendation of the Special Master. The principal purpose of this memorandum is to more specifically address the objections filed by Mr. Dubbin on behalf of HSF-USA.

Mr. Dubbin has been filing objections for several years, all premised on the same flawed reasoning. *See* Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, filed September 11, 2003 (hereafter "Motion for Immediate Distribution "); Response of Holocaust Survivors Foundation-USA, Inc. to Special Master's Interim Recommendation (hereafter "HSF Response"); Objections of U.S. Survivor Groups to Special Master's Recommendations Concerning Allocation of Accumulated Interest on Settlement Funds, filed September 27, 2002 (hereafter "HSF Objection to Allocation of Interest"). While the HSF-USA has never demonstrated that it has any legal standing to raise these objections (a point I will discuss later), it is important to address them on the merits. Professor Neuborne has done so in a characteristically comprehensive and thoughtful affidavit. *See* Supplemental Neuborne Declaration. I do so here.

Part I: The Merits of HSF-USA's Objections

As Professor Neuborne observed, HSF-USA's objections can be divided into three categories. First is Mr. Dubbin's demand that I make a larger

302 F.Supp.2d 89
(Cite as: 302 F.Supp.2d 89)

I also adopted the Special Master's recommendations made in response to my request seeking his view on the appropriateness of allocation of money, if any, that may remain undistributed from the $800 million allocated to the Deposited Assets Class, which is composed largely of heirs of victims of Nazi persecution who deposited funds in Swiss banks. The Special Master recommended that, "as with the excess funds, residual unclaimed funds, if any, should likewise be re-allocated to the Looted Assets Class for distribution to needy Nazi victims in accordance with the *cy pres* principles governing the administration of that class." Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, at 7 (hereafter "Special Master's Interim Report"). Because any such distribution would involve residual unclaimed funds, "the disposition of which has not yet been the subject of discussion by class members, the Special Master recommend[ed] that the Court solicit proposals from a broad array of interested persons and organizations as to how best to identify and to benefit the neediest survivors." *Id.* He further urged that, "depending upon the amount of residual, if any, the Court may wish to consider a modest distribution to communal, remembrance and/or educational programs." *Id.* at 13 n. 14.

The Special Master observed that, by the end of the proposed filing and comment period in connection with proposals submitted by interested persons and organizations, a reasonably firm Deposited Assets Class distribution assessment should be available, rendering it possible to estimate the amount of unclaimed funds, if any, available for *cy pres* distribution. At that point, after considering such proposals, the Special Master will issue a final recommendation as to how to distribute unclaimed funds. The date provided in my ***92** November 17, 2003 order for the submission of the final recommendation of the Special Master was March 15, 2004. I subsequently received numerous requests for additional time to submit proposals, and I extended the date for the Special Master's final recommendation to April 16, 2004. After a public hearing to be held on April 29, 2004, I will make a final determination as to the distribution of any residual funds.

My order of November 17, 2003 also explicitly rejected objections that had been filed by Samuel Dubbin on behalf of the Holocaust Survivors Foundation-USA, Inc., (HSF-USA), and those filed by Robert Swift. I indicated then that an opinion would follow, and I now provide that opinion. The Special Master's Interim Report, the Declaration of Burt Neuborne in Support of the Interim Report of the Special Master (hereafter "Neuborne Declaration "), and the Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel Dubbin, Esq. (hereafter "Supplemental Neuborne Declaration") provide a compelling case for the adoption of the recommendation of the Special Master. The principal purpose of this memorandum is to more specifically address the objections filed by Mr. Dubbin on behalf of HSF-USA.

Mr. Dubbin has been filing objections for several years, all premised on the same flawed reasoning. *See* Motion for Immediate Interim Distribution of Swiss Settlement Proceeds, filed September 11, 2003 (hereafter "Motion for Immediate Distribution "); Response of Holocaust Survivors Foundation-USA, Inc. to Special Master's Interim Recommendation (hereafter "HSF Response"); Objections of U.S. Survivor Groups to Special Master's Recommendations Concerning Allocation of Accumulated Interest on Settlement Funds, filed September 27, 2002 (hereafter "HSF Objection to Allocation of Interest"). While the HSF-USA has never demonstrated that it has any legal standing to raise these objections (a point I will discuss later), it is important to address them on the merits. Professor Neuborne has done so in a characteristically comprehensive and thoughtful affidavit. *See* Supplemental Neuborne Declaration. I do so here.

Part I: The Merits of HSF-USA's Objections

As Professor Neuborne observed, HSF-USA's objections can be divided into three categories. First is Mr. Dubbin's demand that I make a larger

EXHIBIT 9

Westlaw.

424 F.3d 132
(Cite as: 424 F.3d 132)

H
Briefs and Other Related Documents

United States Court of Appeals,Second Circuit.
In re HOLOCAUST VICTIM ASSETS LITIGATION.
Samuel J. Dubbin, Plaintiff-Appellant,
Pink Triangle Coalition, Karl Lange and Pierre Seel, Interested Parties-Cross-Appellants,
v.
Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions # 1-100, John Does # 1-100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association, and Bank of International Settlements, Defendants-Appellees,
Plaintiffs' Executive Committee Settlement Class, Interested-Party-Appellee,
Judah Gribetz, Special Master,
Jacob Friedman, Estelle Sapir and Miriam Stern, on behalf of themselves and all other persons similarly situated, Plaintiffs,
World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss, Intervenor-Plaintiffs,
Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya, and Eliazar Bloshteyn, Interested-Parties,
Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representative to the United Nations of Agudath Israel World Organization, Movants,
G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, Holocaust Survivors Foundation USA, Inc. (HSF), David Schaecter, individually and as President of the Holocaust Survivors Foundation-USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS), National Association of Jewish Holocaust Survivors (NAHOS), David Mermelstein, individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Children of the Holocaust, Inc., Esther Widman, individually as member of the National Association of Jewish Holocaust Survivors (NAHOS), Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project (SHARP), Survivors of the Holocaust Recovery Project (SHARP), Nesse Godin, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater Washington, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation-USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton (Century Village), Holocaust Survivors Club of Boca Raton (Century Village), Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid,

Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self-Determined Lives, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, USA, Center for Independent Living, Berkeley, USA, California Foundation for Independent Living Center, Independent Living Resource Center, San Francisco, Computer Technologies Program, USA, Ragged Edge/Avocado Press, USA, Legal Advocacy for the Defense of People with Disabilities, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary, Appellants.

Docket Nos. 04-1898(L), 04-1899(CON).

Argued: May 16, 2005.
Decided: Sept. 9, 2005.

Background: Following judicial approval of settlement of consolidated class actions brought by Holocaust victims against Swiss banks, 105 F.Supp.2d 139, objections were made to Special Master's recommendations regarding allocation of settlement funds. The United States District Court for the Eastern District of New York, Edward R. Korman, Chief Judge, 302 F.Supp.2d 89, allocated funds, and appeal was taken.

2**Holding:** The Court of Appeals, Cabranes, Circuit Judge, held that district court's geographic allocation of funds earmarked for needy survivors was not abuse of discretion.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚷947

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk947 k. Further Evidence, Findings or Conclusions. Most Cited Cases

Remand to district court to resolve question of appellant's standing was not warranted where merits of appellant's claims would be fully adjudicated in course of addressing claims brought by other appellants who clearly had standing.

[2] Deposits in Court 123 ⚷11

123 Deposits in Court
123k11 k. Disposition Under Judgment or Order of Court. Most Cited Cases
(Formerly 89k72)

District court, when allocating cy pres distribution of proceeds from settlement of consolidated class actions brought by Holocaust victims against Swiss banks, did not abuse its discretion by directing 75% of funds earmarked for needy survivors to survivors residing in former Soviet Union and only 4% to such survivors residing in United States; court could properly consider, among other factors, history of previous compensation efforts and geographic disparities in survivors' current financial needs.

[3] Compromise and Settlement 89 ⚷72

89 Compromise and Settlement
89II Judicial Approval
89k72 k. Construction, Operation, and Effect; Supervision. Most Cited Cases

Federal Courts 170B ⚷813

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

District court has broad supervisory powers with respect to administration and allocation of settlement funds, and appellate court will disturb scheme adopted by district court only upon showing of abuse of discretion.

[4] Federal Courts 170B ⚿812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of Discretion. Most Cited Cases

District court "abuses" or "exceeds" discretion accorded to it when (1) its decision rests on error of law or clearly erroneous factual finding, or (2) its decision, though not necessarily product of legal error or clearly erroneous factual finding, cannot be located within range of permissible decisions.

[5] Deposits in Court 123 ⚿11

123 Deposits in Court
123k11 k. Disposition Under Judgment or Order of Court. Most Cited Cases
(Formerly 89k72)

Cy pres allocation of settlement funds exceeds bounds of district court's discretion when court (1) fails to offer any indication of having carefully weighed all considerations relevant to allocation; and (2) makes no findings in connection with its distribution of funds.

***134** Edward Labaton, Goodkind Labaton Rudoff & Sucharow, LLP, New York, NY (Arthur J. England, Jr., Charles M. Auslander, and Brenda K. Supple, Greenberg Traurig, P.A., Miami, FL; Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL; Stephen Burbank, Philadelphia, PA, of counsel) for Appellants.
Burt Neuborne, New York, NY, and Robert A. Swift , Kohn Swift & Graf, PC, Philadelphia, PA (Melvyn I. Weiss, Deborah M. Sturman, Milberg Weiss Bershad & Schulman LLP, New York, NY; Morris A. Ratner, Caryn Becker, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY) for Appellees.
Alan S. Jaffe (Charles S. Sims, Gregg M. Mashberg , and Frank R. Scibilia, of counsel), Proskauer Rose LLP, New York, N.Y. for amici curiae The American Jewish Joint Distribution Committee and Idud Hasadim.
Marshall Beil, McGuire Woods LLP, New York, N.Y. (Joseph S. Kaplan, and ***135** Christine M. Fecko, McGuire Woods LLP, New York, NY; Michael D. Lissner, Lissner & Lissner, New York, NY, of counsel) for amici curiae The Association of Jewish Family & Children's Agencies, Inc., The Blue Card, Inc., The Nachas Health and Family Network, Inc., and the Margaret Tietz Nursing and Rehabilitation Center.

Before: MESKILL, NEWMAN, and CABRANES, Circuit Judges.
JOSÉ A. CABRANES, Circuit Judge.
The Holocaust Survivors Foundation-U.S.A., Inc. (" HSF"), and several individuals and organizations, appeal from the March 9, 2004 memorandum and order of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*).[FN1] The District Court rejected the HSF's objections to the Court's earlier orders, which had allocated supplemental funds to one of the settlement classes in the litigation styled as the Holocaust Victim Assets Litigation. On appeal, the HSF continues to object to the manner in which the District Court allocated funds among class members. In particular, the HSF asserts that needy Holocaust survivors residing in the United States have received a disproportionately small allocation, relative to the needy survivors residing in the former Soviet Union ("FSU").

FN1. This appeal was consolidated with an appeal from the District Court's denial of attorney's fees brought by Samuel J. Dubbin, HSF's counsel. We adjudicate Dubbin's appeal in a separate opinion. *See In re Holocaust Victim Assets Litig.,* 424 F.3d 150 (2d Cir.2005).

Because the District Court acted well within the bounds of its discretion in allocating the settlement fund, we affirm.

background

I. Swiss Bank Settlement

The Holocaust Victim Assets Litigation began in 1996 and 1997, when several class actions against leading Swiss banks were filed in the District Court and subsequently consolidated. *See In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d 139, 141 (E.D.N.Y.2000). The District Court has described the principal claims of these class actions as follows:

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.

Id. at 141-42. In May 1997, defendant banks moved to dismiss the litigation or, in ***136** the alternative, to stay the proceedings. *Id.* at 142.

While defendants' motions were pending, the parties engaged in settlement discussions facilitated by Stuart E. Eizenstat, then Under Secretary of State and Special Representative of the President and Secretary of State on Holocaust Issues. *Id.* In August 1998, after the District Court became involved in the discussions, the parties agreed in principle to settle the litigation for $1.25 billion to be distributed for the benefit of "Jews, homosexuals, Jehovah's Witnesses, the disabled and Romani-groups recognized by the United Nations as having been the targets of systematic Nazi persecution." *Id.* at 142-43. On January 26, 1999, the parties formally executed the Class Action Settlement Agreement ("Settlement Agreement"), subject to the District Court's approval.

On March 30, 1999, the District Court provisionally approved the Settlement Agreement and certified, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3),[FN2] five settlement classes: Deposited Assets Class, Looted Assets Class, Slave Labor Class I, Slave Labor Class II, and Refugee Class. *Id.* at 143-44. Membership in all except the Slave Labor Class II is limited to members of groups targeted for Nazi persecution. [FN3]

FN2. Fed.R.Civ.P. 23 provides, in relevant part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation

concerning the controversy already commenced by or against members of the class;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(D) the difficulties likely to be encountered in the management of a class action.

FN3. Membership in those four classes was limited to "Victim[s] or Target[s] of Nazi Persecution," a phrase that encompassed individuals or entities " persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped." Settlement Agreement § 1.

Two of the classes are particularly relevant to this appeal. The Deposited Assets Class, as its name suggests, consists of Nazi persecution victims and their heirs whose claims are grounded in assets that were *deposited* by the victims with Swiss banks.[FN4] *See id.* at 143. The Looted Assets***137** Class, by contrast, includes principally "those who claim their property was *looted* by Nazis and then *disposed* of through the Swiss Banks." [FN5] *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 185 (2d Cir.2001) (emphasis added).

FN4. Specifically, the Deposited Assets Class includes "Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Deposited Assets or any effort to recover Deposited Assets." Settlement Agreement § 8.2(a). It should be noted that the term "Releasees" under the Settlement Agreement is not limited to Swiss bank defendants, and that the Settlement Agreement resolved legal claims against, *inter alia,* the Swiss government, the Swiss National Bank (that is, Switzerland's central bank), and certain Swiss businesses. *Id.* at § 1.

FN5. The Settlement Agreement defined members of the Looted Assets Class as " Victims or Targets of Nazi Persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from Looted Assets or Cloaked Assets or any effort to recover Looted Assets or Cloaked Assets." Settlement Agreement § 8.2(b). The term "Looted Assets" refers to assets "actually or allegedly belonging in whole or in part to Victims or Targets of Nazi Persecution that were actually or allegedly stolen, expropriated, Aryanized, confiscated, or that were otherwise wrongfully taken by, at the request of, or under the auspices of, the Nazi Regime." *Id.* at § 1. The term "Cloaked Assets," by contrast, refers to assets belonging to, *inter alia,* entities and individuals "associated with the Nazi Regime ..., the identity, value or ownership of which was in fact or allegedly disguised by ... any Releasee." *Id.*

The Settlement Agreement provided for the appointment of a Special Master to "develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." Settlement Agreement § 7.1. As Lead Settlement Counsel, Professor Burt Neuborne of the New York University Law School,[FN6] explained:

FN6. Although the Lead Settlement Counsel does not represent any party in the context of these appeals, he has played a number of important roles in this litigation, both as a representative of the plaintiffs and as "something of a general counsel to the administration of the settlement fund." *In re Holocaust Victim Assets Litig.*, No. CV 96-4849, slip op. at 3 (E.D.N.Y. Sept. 13, 2004). The District Court has authorized the Lead Settlement Counsel to provide "an adversarial defense" of the District Court's position in this Court. *Id.*, slip op. at 1.

[t]he decision to utilize a Special Master to propose a plan of allocation and distribution was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund that, while substantial, is necessarily insufficient to do full justice to all members of each plaintiff class. It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members.

In re Holocaust Victim Assets Litig., Submission of Lead Settlement Counsel in Support of the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, No. CV 96-4849, at 3 (E.D.N.Y. Nov. 20, 2000). On March 31, 1999, the District Court appointed The Honorable Judah Gribetz as Special Master for this litigation.[FN7]

FN7. As the District Court later underscored, Mr. Gribetz

is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage-A Living Memorial to the Holocaust, which is located in New York. He is also the author of The Timetables of Jewish History (1993).

In re Holocaust Victim Assets Litig., 2000 WL 33241660, at *1, 2000 U.S. Dist. LEXIS 20817, at *5-*6 (E.D.N.Y. Nov.22, 2000).

***138** Under the District Court's direction, an extensive plan was implemented to give notice of the Settlement Agreement to members of the settlement classes. 105 F.Supp.2d at 144-45. This notice plan included "(i) world-wide publication, (ii) press coverage, (iii) an extensive community outreach program, (iv) a direct mail program that included the sending of more than 1.4 million notice packages directly to potential class members in at least 48 countries and (v) an Internet notice effort." *Id.* The District Court then conducted two fairness hearings-one in its Brooklyn courtroom on November 29, 1999 and another by telephone connection with Jerusalem on December 14, 1999. *Id.* at 145.

On August 9, 2000, the District Court's final order and judgment approving the Settlement Agreement was entered.[FN8] In discussing the procedural fairness of the settlement, the District Court observed:

FN8. The Settlement Agreement was approved by the District Court as amended by the parties, most recently on on August 9, 2000. Subsequent references to the Settlement Agreement are to the amended version granted final approval by the District Court.

[B]ased upon my extensive personal involvement in the process, I know that the compromise was reached as the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties. Counsel for the plaintiff settlement classes are experienced plaintiffs' advocates and class action lawyers. One could not assemble a more capable group. Among the lawyers for the plaintiffs who are serving without fee are Professor Burt Neuborne of New York University Law School, a brilliant scholar and advocate, who developed the class's legal theories and who presented legal argument on behalf of plaintiffs, and Melvyn H. Weiss and Michael D. Hausfeld, leading members of the class action bar, who ably led plaintiffs' negotiating team. While I have independently evaluated the fairness of the settlement, the unanimous support of this group in favor of final approval is entitled to great weight.

Id. at 146. The Court declined, however, to embrace at that point any specific method of allocating and distributing the $1.25 billion fund, explaining the sequence of its decisions as follows:

[O]rdinarily, it is preferable to provide specific information to class members concerning their likely recovery prior to the fairness hearing in order to permit criticism and challenge, if appropriate. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of events that transpired approximately 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the Settlement ....

.... [O]nce I have approved the basic fairness of the settlement and its attendant procedures, the Special Master will promptly issue his recommendations concerning allocation and distribution and those recommendations will be transmitted for comment and criticism to the members of the plaintiff classes. Only after I approve the plan of allocation***139** and distribution will a claims process capable of generating specific figures be possible.

Id. at 150-51.

On September 11, 2000, the Special Master submitted to the District Court a proposal for the allocation and distribution of settlement proceeds. *See In re Holocaust Victim Assets Litig.,* No. CV 96-4849 (E.D.N.Y. Sept. 11, 2000) (Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds) ("Special Master's Proposal"), *at* J.A. 714. The Special Master reported that, in the course of developing his proposal, he had consulted with dozens of individuals, "reviewed many formal proposals submitted from around the world," and received thousands of letters, primarily from Holocaust survivors. *Id.* at 2; *at* J.A. 720. The suggestions received by the Special Master shared several " common themes":

that the task before the Special Master and, ultimately, the [District] Court, is daunting; that the settlement of the litigation against the Swiss banks represents, in some small fashion, another historic opportunity in the attempt to redress the indescribable wrongs that have been wrought against the victims of the Holocaust; and that the allocation and distribution of the $1.25 billion settlement fund should be meaningful, with some lasting impact upon class members.

Id. (footnote omitted). Many of those who communicated with the Special Master, especially Holocaust survivors, viewed the Swiss Bank settlement as "a further step along the often tortuous path toward accountability and remembrance." *Id.* Furthermore, the Special Master undertook his task-the "daunting" task of allocating and distributing "an historic, yet limited, settlement fund in a manner which is fair, equitable and consistent with governing legal principles"-with the recognition thatno amount of money could begin to compensate the millions of victims of Nazi persecution for the horrors they suffered during the Holocaust, that no amount of money could restore the generations that were lost, and that no amount of money could right the injustice perpetrated by Nazi Germany that has been termed "one of the greatest thefts by a government in history."

Id. at 2-3 (quoting Stuart E. Eizenstat, *Foreword* to Stuart E. Eizenstat & William Z. Slany, U.S. Dep't of State, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II-Preliminary Study* at iii, iii (1997), *available at* http://www.state.gov/www/regions/eur/ngrpt.pdf), *at* J.A. 720-21.

In allocating the $1.25 billion settlement fund among the five settlement classes, the Special Master concluded that the Settlement Agreement accorded "priority" to distributions directed to members of the Deposited Assets Class. *Id.* at 10-12, *at* J.A. 728-30. The Special Master underscored that

[m]ore than three years after the complaints were

EXHIBIT 10

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The Jewish Week
SERVING THE JEWISH COMMUNITY OF GREATER NEW YORK
(05/07/2004)

Whose Money Is It?

A debate on who should get unclaimed Swiss bank funds. Two essays by Thane Rosenbaum and Burt Neuborne

Thane Rosenbaum and Burt Neuborne - Special To The Jewish Week

Even when it comes to restitution for the living, somebody has to speak up for the dead. The dead cannot make monetary claims, yet they have the right to assert moral ones — on all of us.

Throughout these recent restitution initiatives, there has been a lot of acrimony about money, but very little focus on dignity, which is a hallmark of moral justice. The precedent that the Swiss bank case creates, the impression it leaves, the memory it honors, in many respects is as important as the money it distributes.

The court's allocation formula contemplates distributing 75 percent of the recovered looted assets to Nazi victims who now live in Russia based on an indiscriminate finding of overall need. Meanwhile, the court plans to allocate only 4 percent of the money to Holocaust survivors living in the United States based on a presumption that the American survivor community is either more affluent or can seek charitable assistance elsewhere.

But there are, conservatively estimated, a minimum of 30,000 Holocaust survivors in the U.S. living under the poverty line, and nearly half of these people have no access to social services. In what meaningfully material way are these people less destitute than the victims of the former Soviet Union?

The U.S. and Russia each have roughly 18 percent of the worldwide population of Nazi victims living within their borders (with roughly 46 percent living in Israel). Yet when it comes to a narrower definition of Holocaust survivors — the way such a designation is more conventionally understood, not as mere targets of Nazism, but rather those who were either in concentration camps, ghettos or subject to slave labor — the moral basis for such a lopsided windfall to Russia loses all moral currency.

Of the Holocaust survivors worldwide who were interned in concentration or slave labor camps, or who were in ghettos, an estimated 28 percent live in North America, while 13 percent reside in both the FSU and in all of Eastern Europe. (The number for Israel is about 50 percent).

Under what moral grounds, and legal criteria, is it proper to favor one community of Nazi victims over another when the American and Israeli survivors comprise the vast majority of former concentration camp inmates?

There is a long history in art, culture, politics and even law that

Holocaust survivors — those who witnessed the Nazi horrors, those who survived the concentration camps — automatically obtain a privileged position whenever it comes to matters pertaining to Nazi genocide. They cannot, as a matter of basic moral justice and decency, be deprived of legal standing to speak — in any forum or tribunal — about the horrors they witnessed. And similarly, they should not be deprived of money that derives from their losses, particularly if they have needs that are being unmet elsewhere.

These people are iconic figures; indeed, they have become metaphors for mass murder. The Nazis gave them special, forbidden knowledge. They observed firsthand inhumanity at its most barbaric and extreme. It is their unspoken testimony that sets them apart from the rest of us — even from the rest of all other Holocaust survivors. It is what makes them entitled to everything we can do, and anything they wish to say.

The Jews of the FSU are not, as the Brooklyn Federal Court continues to proclaim, the double victims of Nazism, which now justifies them, presumably, to double relief. The Nazis had no agenda for Jews other than mass death. They would never have contemplated life in the Soviet Union as a sufficient punishment for the Jews of Europe. The Final Solution was not about hardship but annihilation. Such a twisted formulation of comparative suffering is an indignity to those who witnessed the Nazis in action. What happened at Auschwitz was incomparable. Being a casualty of communism is in no way the same thing as having survived the camps.

Yet there is no question that those Jews who fled Eastern Europe and avoided the camps altogether eventually found themselves caught on the wrong side of the Iron Curtain. They left behind a great deal — people and possessions they could never reclaim. And after the war they suffered enormously, and they have continued to suffer economically in the ravaged evolution of the post-Soviet society. But the cruelties and deprivations of communism are, legal and morally, not the subject of these restitution proceedings.

And frankly, while it is true that many of these Russian Jews experienced terrible hardships after the Holocaust, they were fortunate to be in the Soviet Union during the Holocaust. They showed great instincts, fortitude and courage in venturing east, but such sacrifices ultimately saved their lives.

Surely Holocaust victims who survived the worst of the Nazi murder machine, and have present economic or medical needs — regardless of where they now live — are entitled to receive restitution funds. Excluding survivors with such genocidal pedigrees is an affront not only to the living, but also a desecration to the memory of the dead. It is the blanket and indiscriminate favoritism I oppose because in the concentration camp universe, all men and woman were equal in the eyes of the murderers. Why are they not at least equal in the eyes of this court?

Indeed, this court seems to be saying that the very people who are entitled to restitution — given what they witnessed, given what they survived, given what they lost — should instead look to Jewish institutions for charity, while those who properly should seek charity instead are to receive restitution from money that in all probability is not even traceable to their losses.

It is morally unconscionable for those whose needs are great, who witnessed the worst and who are now suffering from the consequences of what they saw to be disallowed from receiving their fair share of these restitution proceeds simply because they were liberated from the concentration camps and did not end up in the Soviet Union.

Restitution is not the same as charity. Restitution is legally and morally very specific. You receive it for what happened to you, and what you lost, at the time the injury occurred.

The court likes to focus on the fact that American survivors have thus far received 29 percent of the settlement proceeds. Therefore, they shouldn't complain that they are now going to be grossly shortchanged in receiving restitution for looted assets. But these American recoveries derive from bank accounts and slave labor claims. We should take no pride in returning money back to the people who once owned it, or in finally paying workers for their slave labor.

Why should a desperate Holocaust survivor be deemed ineligible to receive restitution simply because someone else had a Swiss bank account and finally got his money back?

Similarly, the fact that Holocaust survivors worldwide have received $50 billion over the past 50 years from the German government in reparations payments is equally irrelevant to this discussion. These are pension payments for suffering, and have nothing to do with restitution for looted assets. And given the high percentage of concentration camp victims who ended up in Israel and America, they were certainly deserving of reparations for their suffering.

Finally, many survivors, on moral grounds, chose not to accept such payments. Why then should these people now be prevented from recovering looted assets from the Swiss simply because they had once declined to take any money from the Germans?

Clearly we all deplore dog-eat-dog dimensions of these proceedings. But let us not trivialize and desecrate the memory of those who died in the most ghastly and extraordinary of ways by equating it with postwar sufferings. The legacy of the Swiss bank case should not be remembered as having allowed destitute Holocaust survivors — regardless of present geography — to die on this court's watch with numbers still on their arms. The concentration camps were a uniquely different, more ferocious strain of inhumanity. The dead demand that we do not mix metaphors. Let us focus on the Nazi atrocity and not on the perils of a far less evil empire. n

Thane Rosenbaum, a novelist and law professor, is the author of "The Myth of Moral Justice: Why Our Legal System Fails to do What's Right." This essay is adapted from remarks originally addressed to Judge Edward Korman at last week's hearing in Brooklyn Federal Court.

Burt Neuborne

Special To The Jewish Week

The Jewish community is in the midst of a passionate, even angry, debate over the distribution of a portion of the Swiss bank Holocaust settlement. The settlement fund initially allocated $800 million for the return of Swiss bank deposits; more than $200 million for surviving slave laborers; at least $100 million to victims of Nazi looting; and up to $50 million to those denied entry into, or expelled from, Switzerland during World War II because they were Jews.

As of May 1, approximately $230 million has been distributed to 138,000 surviving Jewish slave laborers, about 30 percent of whom live in the United States; $205 million committed to the support of the poorest survivors, most of whom live in the former Soviet Union; approximately $10 million paid to refugees driven from Switzerland because they were Jews; and approximately $160 million returned to holders of Swiss bank accounts, many of whom live in the U.S.

Largely because of the massive destruction of records by the Swiss banks, we must face the prospect that we will be unable to return the full $800 million. Estimates of the amount that cannot be returned to true owners range from zero to $400 million.

The question before the Jewish community is what should be done with the residual funds. Any allocation of those funds must meet the requirements of law and should strike a chord of fairness. But what does fairness require in this context?

Although you would never know it from reading The New York Times, a substantial consensus has emerged on two crucial allocation issues. First, most are agreed that all residual funds should be devoted to assisting survivors directly rather than being used for community betterment.

Second, given the limited size of the residual fund, it is not feasible to divide it equally among all Holocaust survivors because the actual payment to each person would be so small. Thus, virtually everyone agrees that the residual funds should be used to help the poorest survivors live out their lives in dignity.

The difficult issue dividing the community is how to identify the poorest survivors and get them relief in the fairest manner. Until now the Brooklyn Federal Court has operated on the basis of demographic evidence placing the bulk of the neediest survivors in the former Soviet Union, where 125,000 destitute elderly survivors of both Hitler and Stalin receive minimal food, fuel and emergency care from the chesed program administered by the American Jewish Joint Distribution Committee.

Passionate voices are urging the court to recognize that thousands of extremely poor survivors — many of them emigres from the FSU — also live in Israel and the U.S. Equally passionate voices point out that poor survivors living in Israel and the U.S. have the benefit of Western social safety nets and communal support that simply do not exist in the FSU. They argue that providing food to hungry Holocaust survivors should be the first priority for any residual funds, and that means tilting the residual funds to the former FSU.

Judge Edward Korman, in an effort to chart the fairest course, asked all interested parties to provide him with the latest demographic data, with the figures on the whereabouts and needs of the poorest survivors. The result was an outpouring of information and advice, culminating in more than 100 formal written submissions to the court and a remarkable 11-hour hearing on April 29 at which Korman heard personally from every interested person who wished to speak to him.

What makes Korman's job so difficult is that reasonable people can — and do — differ over almost every facet of the problem, though I will support his ultimate judgement. For example, when will we have looked long enough for the bank accounts to declare the process over? If there are residual funds, should we ignore Jewish education? Is it fair to concentrate the residual funds on the poorest survivors? If so, how do we measure who is truly poor?

Should we take differing social safety nets into consideration in measuring a survivor's need? Does Israel, facing the intifada and grave economic difficulties, need special help in coping with the massive influx of elderly survivors from the FSU? What about impoverished elderly survivors in the U.S., many of whom are recent emigres from the FSU? Who counts as a Holocaust survivor? Must you have been confined to a camp or to a ghetto?

Finally, since the case is about Swiss banks, must a needy survivor show a link to Swiss, as well as Nazi, misbehavior?

There are no objectively correct answers to these questions, and efforts to advance a calculus that claims to identify the single morally required way to carry out the task are either naive or manipulative. How do you measure the past suffering of a concentration camp survivor residing in Florida against the current hunger of a destitute elderly survivor in Kiev who was never in a camp but was forced to flee to Siberia to escape the Nazis?

As lead settlement counsel, my personal views are deeply conflicted. On the one hand, the mind-numbing level of want among destitute elderly Holocaust survivors in the FSU cries out for sympathy and assistance. On the other, the very real specter of survivors in need in the U.S. and Israel demands attention, especially in view of Israel's current financial plight.

Were the decision mine, I would tilt the residual funds strongly to the poorest survivors in the FSU, but I would channel a significant portion to poor survivors in the rest of the world, not because law, logic or morality demands it, but because I would want survivors everywhere to feel that they had participated significantly in a historic settlement that is designed to acknowledge their common suffering.

Sadly, one of the few false notes struck during the hearing last week were by one or two well-meaning people who lectured Judge Korman, accusing him of "desecrating" the memory of the Holocaust by proposing to use the bulk of any residual funds to provide food for the neediest survivors, wherever they may reside.

Adopting the German government's definition of a Holocaust survivor, one or two speakers even argued that Russian Jews who survived Hitler and Stalin should not be viewed as true Holocaust survivors, despite the murder of 2 million Russian Jews by the Nazis. Taken seriously, such an argument would deny assistance funded by residual Swiss bank funds to all impoverished elderly survivors from the FSU whether they live in Minsk, Tel Aviv or Brooklyn.

Fortunately, not a single responsible institution in the Jewish world agrees with such an effort to divide Holocaust survivors into first- and second-class victims.

Finally, a word about the spectacle of Jews squabbling in public over Holocaust funds. My first reaction was deeply negative. But as I sat in that courtroom last Thursday from 9:30 a.m. to 8:30 p.m., I realized that with only a very few exceptions, the predominantly elderly participants were deeply respectful of each other's views. Virtually no one wanted any money for themselves. Rather, hundreds of elderly Holocaust survivors from as far away as Florida and California were gathered to debate how best to use the residual Swiss funds to benefit the poorest and weakest among them.

I marveled at the resiliency of a Holocaust generation that had suffered more intensely than any in history but which, in old age, could summon the energy and moral grandeur to argue passionately about how best to assist its weakest members. Shame on the rest of us for allowing a single Holocaust survivor to die in need. n

Burt Neuborne has served since 1999 as lead settlement counsel in the Swiss bank Holocaust litigation pending in Brooklyn Federal Court. He is the John Norton Pomeroy Professor of Law at New York University Law School.

image2goeshere

Here is a list of other articles in this section

- A Dead Shul Lives Online
  Rescued Washington Hts. prayer books spark memories, thanks to Internet.
- A High-Maintenance American Dream
  Russian émigrés who bought co-ops call on attorney general to investigate their corruption claims.
- Early Planning For Olmert Visit
  Big dose of U.S. aid for West Bank pullout could be stumbling block.
- Former AIPACers Get Personal
- From Chappaqua To Chad
  Westchester rabbis and their congregants rally to save Darfur.
- Jewish Task Force To Aid Israeli Arabs
  Addressing 'neglect' of minority is more crucial than ever, say leaders at conference here.
- Jewish Week Takes Writing Honors
  First place for general excellence, in-depth reporting in New York Press Association contest.
- Keeping The Flame Burning
  L.I. firefighters inaugurate new chapter of Ner Tamid fraternal society.
- Moving To The 'Burbs
  Manhattan's Solomon Schechter High merges with New Jersey counterpart; will New York kids cross the Hudson?
- Never Again — For Darfur
  They came wearing knitted kipot, black hats and T-shirts, representing every religious stream of Judaism and every political point of view. But what comes next remains an open question.
- Paul Spiegel, German Jewish Leader
  Head of the community succumbs at 68.
- Retreat And Advance
  As funky Elat Chayyim closes its doors, some wonder if it will be replaced by a more upscale Jewish retreat center.
- Satmar Brothers Seek 'Self-Fulfilling Prophecy'
  Getting word out to media seen as strategy for rivals to win political support.
- The Beer At The End Of The Tunnel
- 'First Step' Toward Education Credit
  Advocates of state-sponsored tuition break see victory in school-age relief; Bloomberg Jewish liaison stepping down.

EXHIBIT 11

I am an elected leader of a nationwide Survivor organization. I had expressed my views on Neuborne's fee-request on previous occasions and did not really want to get further involved. However, Neuborne's latest attempts at trying to justify his request is so riddled with distortions and inaccuracies that it makes the blood boil of all who - for seven years - were closely involved in this issue and know the truth. Notr only did he not reveal ex ante that he was going to seek a fee, he repeately asserted - throughthout all the years - that he was serving pro bono. He did not mind basking in the undeserved repute of a benevolent advocate for the Holocaust survivors even though he apparently knew that this was not going to be the case. He had an ethical obligation of revealing to all parties involved that he was not only going to charge for his services, but was going to charge as much as large law firms with substantial overhead expenses,even though he could have had some of his students perform some of the tasks he now claims to have performed. Neither did Judge Korman ever indicate - during all the years - that the perception by the survivors that Neuborne was working pro bono was erroneous.

In his latest fumbling explanations did he reveal that all of the U.S. "Looted Assets" class members received - over all the years of the settlement - a grand total of $3,008,000, while he is clamoring for $4,100,000 for defending Judge Korman' decision to send 75% of the designated funds for that class to the former Soviet Union. What a charade. Does anyone truly believe that there ever was a legal nexus between the poverty of Soviet Jews and the misdeeds of the Swiss banks ?

Under communism, how many had insurance policies or assets that could be converted to be deposited in Swiss banks ?

Some larger Jewish organizations had proclaimed that they wanted to rebuilt Jewis life in Eastern Europe. This might be a worthwhile project, but don't use funds that morally, ethically and legally ought to belong to Nazi victims who had to tremble for their lives; for what seemed to be unterminable years. We feel that Neuborne ought to be paid by Judge Korman's Court, not with funds that the Swiss banks assumed to be going for relief to actual victims. Undoubtedly there are needy Jews in the FSU, but there are needy Jews in the U.S.A. as well; hunger and deprivation is not any less hurtful if it is experienced in a wealthy country. The Swiss banks proceeds were not intended as a general global relief fund for all kind of causes.

Leo Rechter, Executive director of National Association of Jewish Child Holocaust Survivors. (NAHOS)

1. Posted by: **Leo Rechter** | Jul 6, 2006 8:41:39 PM

EXHIBIT 12

My Letter to Burt Neuborne, which was never answered.

1.

Professor of Law Mr. Burt Neuborne March 7, 2006
New York University School of Law
40 Washington Square South, Room 307
New York, N.Y. 10012-1099

Dear Professor Neuborne,

This is a reply to your letter dated February 17, 2006. I did not misunderstand your remarks on September 26, 2005 at the Miami Court House. David Mermelstein, Jack Rubin and others heard the same dialogue as I did. During the phone conferences with the survivors I was told you said that you were working pro-bono on the Swiss Bank Settlements. Is this also a misunderstanding?

Professor Neuborne you keep bringing up percentages of fees that you are asking for compared to other attorneys. As Judge Seitz said " percentages do not pay our bills". When I, as a victim who work pro bono on the Advisory Committee for Jewish Family Services in Palm Beach County in Florida, look at a fee of $4 million, here's what I see: " home care for a needy victim is $13.00 per hour, for an
average of eight hours per week = 13x 8hours equals to $104.00; multiply this by 52
weeks equals to $5408 per year, now lets divide this amount into $4 million that
equals 740, to me it means that 740 victims can receive home care for a year. Perhaps you should come down to one of our meetings and see for yourself what is happening in the trenches, you will see our concern.

I have been involved in the Hungarian Gold Train case since 2001, by going to the hearings in Miami (I live a hundred miles from Miami each way and do not receive any compensation for mileage) and was in consultation with Mr. Dubbin , Mr. Cuneo and Mr.Walton till the fruition of the settlement. During this period I became aware of the hours and devotion given by the three sets of attorneys in this case. Therefore I did not look at the percentages, my consideration was the hours spent by all the attorneys and the involvement of the small group of Hungarian victims, and the final outcome of the settlement where the numbers were not as great as your settlements. However, I did not see you or any other attorneys willing to be involved in the Hungarian Gold Train Case. Perhaps you felt that there was no chance of getting any settlements from the U.S. government for the looting the U.S. Army did to the Hungarian Victims' possessions on the 24 train cars. Now that the attorneys in the Hungarian Gold Train case were successful you were there to criticize the fees and on the final day of the hearing, you showed up in Miami representing 13 victims who live in Hungary (out of a total of 62,000 plaintiffs) you did not even know their names when you were asked. Then you asked for victims in Hungary for an additional 10% of the funds that was allocated to the Hungarian victims in the U.S.A. and Israel. I call this type of behavior "chutzpah".

I'm not against an attorney earning a living, if the fees are agreed upon up-front and disclosed and not kept secret till years later. Why the deception? What I and other survivors are against is a $700.00 hourly rate when a large portion of this work could have been done by others whose rate for this type of work is substantially less. This exorbitant rate is unconscionable. And, while you were charging those rates to the "entire class," what were you actually doing to assist the poor Looted Asset class members in the U.S., Israel, and elsewhere outside the FSU?

I also resent any individual of patronizing all the survivors for having remarkable courage for re-building our lives after the Shoah despite the loss of our families .
Yes we deserve the respect and the admiration of your generation, and after sixty years we should be treated with dignity, understanding, equality, and not by being charged exorbitant undeserved attorney fees and unrealistic administrative fees.

At the meeting on January 20 ,2006 with Judge Korman and Judah Gribetz, the survivors present asked for an accounting of the administrative fees for the Swiss Bank Settlements . Now here we are into March and we were promised but have not yet received the above requested accounting. Action speaks louder than empty promises.

Sincerely,

Alex Moskovic, a' Last Generation Survivor'

7529 SE Bay Cedar Circle
Hobe Sound , Fl. 33455

cc: Judge Edward R. Korman

Posted by: **Alex Moskovic** | Jul 5, 2006 4:57:39 PM

EXHIBIT 13

I am a Holocaust Survivor having lived in fear in Berlin, Germany until my arrest in 1945 and shipped to Dachau shortly before the Russian invaded Berlin. I also wish to add that I am a plaintiff in the case. I never asked the Professor to represent me but always understood that his work in this matter would be pro-bono. I am a member of the Executive Board of the Holocaust Survivor Foundation-USA (HSF-USA). On my own expense I attended HSF-USA meetings in Washington, DC as well as meetings in New York and twice testified in Judge Korman's Court. I certainly am not a Wealthy Holocaust Survivor but am concerned about the needy Holocaust Survivors living in poverty with no health care throughout the United States. The money that Professor Neuborne is requesting would certainly help many a needy survivor and may let him or her die in dignity rather than in Poverty. As we have said to the court (and you all should read our submission before commenting), Neuborne always led us to believe he was working pro-bono. What a surprise. I felt he never did represent our interests. All we wanted he seemed to be against. Do we survivors have no right to speak our minds and have our wishes considered and acted upon? How many more indignities and injustices do we have to endure before the end?

Fred Taucher
Seattle, WA

1. Posted by: **Fred H. Taucher** | Jul 5, 2006 12:04:39 PM